RECORD AND BRIEFS

No. 16-1027

FILED
JUN - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception allows a warrantless daytime inspection of a motorcycle's vehicle identification number and license plate, when the motorcycle is parked in the defendant's driveway, adjacent to the steps leading to the front door of the house, and when the officer has probable cause to believe that the motorcycle is stolen and has twice been used to elude police.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 11

I. The Virginia Supreme Court correctly held that the automobile exception applies when the vehicle is located in a driveway, is visible from the street, and is readily mobile 11

A. The automobile exception applies because Officer Rhodes had probable cause to believe that the motorcycle was stolen and had been used to elude police 12

B. The motorcycle's presence in the driveway does not defeat the automobile exception because the motorcycle had ready access to the street 16

C. Because petitioner had no reasonable expectation of privacy in the stolen motorcycle or its VIN and tag number, Rhodes properly looked under the tarp 25

II. There is no significant split of authorities on the question presented 27

III. This case is a poor vehicle to reach the question presented 33

TABLE OF CONTENTS – Continued

Page

A. No court below made any finding that the motorcycle was parked within the curtilage 33

B. Even if he could escape the automobile exception, Collins would not prevail on his suppression motion 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Evans,
514 U.S. 1 (1995) 33

Brigham City v. Stuart,
547 U.S. 398 (2006) 19

California v. Carney,
471 U.S. 386 (1985) 12, 13, 14, 16, 17, 18

Cardwell v. Lewis,
417 U.S. 583 (1974) 22

Carroll v. United States,
267 U.S. 132 (1925) 2, 11, 12, 13, 16, 24

Chambers v. Maroney,
399 U.S. 42 (1970) 13, 23, 24, 25

Commonwealth v. A Juvenile (No. 2),
580 N.E.2d 1014 (Mass. 1991) 20

Commonwealth v. White,
No. 160879, 2017 WL 2378798 (Va. June 1, 2017) 2

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 21, 22, 23

Dyke v. Taylor Implement Mfg. Co.,
391 U.S. 216 (1968) 15

Florida v. Jardines,
133 S. Ct. 1409 (2013) 20

Keehn v. State,
279 S.W.3d 330 (Tex. Crim. App. 2009) 20

TABLE OF AUTHORITIES – Continued

Page

Kentucky v. King,
563 U.S. 452 (2011) 11, 20

Maryland v. Dyson,
527 U.S. 465 (1999) 11, 12, 28

Michigan v. Thomas,
458 U.S. 259 (1982) 16

Missouri v. McNeely,
133 S. Ct. 1552 (2013) 11

New York v. Class,
475 U.S. 106 (1986) 14, 26, 30, 36, 37

Oliver v. United States,
466 U.S. 170 (1984) 35

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
135 S. Ct. 1318 (2015) 36

Pennsylvania v. Labron,
518 U.S. 938 (1996) 12, 28

Rakas v. Illinois,
439 U.S. 128 (1978) 25

Redwood v. Lierman,
772 N.E.2d 803 (Ill. App. Ct. 2002) 32, 33

Robinson v. Commonwealth,
639 S.E.2d 217 (Va. 2007) 20

Scher v. United States,
305 U.S. 251 (1938) 16, 17, 18, 23, 30, 37

South Dakota v. Opperman,
428 U.S. 364 (1976) 13

TABLE OF AUTHORITIES – Continued

Page

Spears v. United States,
555 U.S. 261 (2009) 32

State v. Corbett,
516 P.2d 487 (Or. Ct. App. 1973) 20

State v. Lejeune,
576 S.E.2d 888 (Ga. 2003).....32

State v. Merrill,
563 N.W.2d 340 (Neb. 1997).....20

State v. Vickers,
793 S.E.2d 167 (Ga. Ct. App. 2016).....31, 32, 33

Texas v. Brown,
460 U.S. 730 (1983) 23

United States v. Beene,
818 F.3d 157 (5th Cir.),
cert. denied, 137 S. Ct. 113 (2016) 29, 30, 31, 33

United States v. Blaylock,
535 F.3d 922 (8th Cir. 2008).....27

United States v. Brookins,
345 F.3d 231 (4th Cir. 2003).....23, 27

United States v. DeJear,
552 F.3d 1196 (10th Cir. 2009).....31

United States v. Dunn,
480 U.S. 294 (1987) 34, 35

United States v. Fields,
456 F.3d 519 (5th Cir. 2006)..... 28, 29, 31

United States v. Goncalves,
642 F.3d 245 (1st Cir. 2011) 22, 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Han,
74 F.3d 537 (4th Cir. 1996) 2

United States v. Hatley,
15 F.3d 856 (9th Cir. 1994) 27

United States v. Hines,
449 F.3d 808 (7th Cir. 2006) 27

United States v. Jones,
565 U.S. 400 (2012) 34

United States v. Markham,
844 F.2d 366 (6th Cir. 1988) 27

United States v. Moody,
668 F. App'x 629 (5th Cir. 2016) 33

United States v. Reed,
26 F.3d 523 (5th Cir. 1994) 28

United States v. Reinholz,
245 F.3d 765 (8th Cir. 2001) 27

United States v. Ross,
456 U.S. 798 (1982) 12, 13

United States v. Sinisterra,
77 F.3d 101 (5th Cir. 1996) 29

United States v. Williams,
124 F. App'x 885 (5th Cir. 2005) 29

Warden, Md. Penitentiary v. Hayden,
387 U.S. 294 (1967) 15

Zivotofsky v. Clinton,
566 U.S. 189 (2012) 36

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 10, 11, 14, 15, 20, 21, 27, 30, 34

STATUTES

Va. Code Ann. § 18.2-108(A) (2014) 8

Va. Code Ann. § 46.2-817(B) (2014) 15

RULES OF COURT

Sup. Ct. R. 10 32

SECONDARY SOURCES

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed. 2012 & Supp. 2016) 19, 21, 26

Mei Fung So, *Search and Seizure: Reasonable Expectation of Privacy in Driveways*, 60 A.L.R. 5th 1 (1998 & Supp. 2016) 19, 27, 33

IN THE SUPREME COURT OF THE UNITED STATES

RYAN AUSTIN COLLINS, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On May 7, 2014, the Circuit Court of Albemarle County, Virginia convicted petitioner Ryan Collins of one felony count of buying or receiving stolen property, a 2008 Suzuki motorcycle. The conviction was affirmed by the Virginia Court of Appeals and by the Supreme Court of Virginia. Collins seeks to invalidate his conviction on the ground that the trial court erred in denying his motion to suppress evidence obtained when Albemarle County police officer David Rhodes pulled back a tarp that covered the motorcycle in order to read the license plate and vehicle identification

number (VIN) on the vehicle's exterior. The facts summarized below are taken from the preliminary hearing, suppression hearing, and trial transcripts.[1]

Officer Rhodes had been investigating Collins because he suspected that Collins was the motorcycle driver who had eluded him on July 25, 2013. Rhodes was driving on the highway in his unmarked cruiser when an orange and black Suzuki motorcycle approached from behind "at a very high rate of speed." Rhodes activated his rear radar and clocked the motorcycle at 100 mph in a posted 55-mph zone. As Rhodes turned on his emergency lights, the motorcycle passed by him and sped away. Rhodes initiated pursuit but stopped the chase out of safety concerns when the motorcycle reached speeds exceeding 140 mph.[2] Rhodes was able to jot down the license-plate number and his

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[1] The transcripts were included in the Joint Appendix in the Supreme Court of Virginia ("Va.-JA __"). Only the transcript of the suppression hearing was reproduced in the appendix to the petition for writ of certiorari. *See* Pet. App. 50. In reviewing a trial court's ruling on a suppression motion, however, "federal courts have held uniformly that an appellate tribunal may consider evidence adduced at trial that supports the district judge's ruling." *United States v. Han*, 74 F.3d 537, 539 (4th Cir. 1996) (citing, *inter alia*, *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Virginia courts follow that principle as well. *See, e.g.*, *Commonwealth v. White*, No. 160879, 2017 WL 2378798, at *1 (Va. June 1, 2017) ("When considering whether to affirm the denial of a pretrial suppression motion, an appellate court reviews not only the evidence presented at the pretrial hearing but also the evidence later presented at trial.").

[2] Pet. App. 66-67, 70-71.

dash camera recorded images of the motorcycle, a still photograph of which was admitted into evidence.[3]

Rhodes testified that the orange and black motorcycle was "very unique."[4] It had a "'stretched out' rear wheel, indicating that it had been modified for drag racing."[5] It also had chrome accents and chrome wheels.[6] Rhodes explained that "it didn't look like a conventional motorcycle."[7] It was "[n]ot something you'd normally see driving down the roadway and not something you can buy from the factory either. So that's a customized type motorcycle."[8]

The tag number led Rhodes to Eric Jones, who revealed that he had sold the motorcycle to Collins.[9] Jones admitted that he knew the motorcycle lacked a title certificate and was stolen.[10] Jones also told Rhodes that he had informed Collins that the motorcycle was stolen.[11] Officer Rhodes drove by the house

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[3] *See* Pet. App. 71-72, 79. The photograph of the eluding motorcycle is reproduced at Pet. App. 116.

[4] Pet. App. 86. *See also* Pet. App. 57.

[5] Pet. App. 3. *See also* Pet. App. 57.

[6] Pet. App. 34, 57.

[7] Pet. App. 57.

[8] Pet. App. 57-58.

[9] Pet. App. 78-80.

[10] Va. JA 140:8-141:4.

[11] At trial, Jones was not sure if he had told Collins that the motorcycle was stolen, something he assumed was evident from the lack of title. But Jones admitted that he *had told Officer*

where he believed Collins lived with his mother, but Rhodes did not find Collins there and did not see the motorcycle.[12]

On September 10, 2013, however, Officer Rhodes heard Collins's name mentioned on his police radio in connection with an incident at the DMV.[13] When Rhodes arrived at the DMV, Collins was already being interrogated by Officer McCall, who was investigating Collins as a suspect in a different motorcycle-eluding incident—also involving an orange and black motorcycle with an extended frame—that occurred on June 4, 2013.[14] Collins denied to both officers that he owned a motorcycle and denied involvement in any eluding.[15]

As Officer McCall questioned Collins, Officer Rhodes was able to access Collins's Facebook page, where Collins had posted several incriminating pictures. The photographs depicted a brick home with a driveway on the left side and a "clearly visible" orange and black motorcycle, resembling the one that had eluded Rhodes, parked in the driveway in between two other vehicles. (The Facebook photographs are reproduced at Pet. App. 112-13.)[16] Rhodes testified that, as

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Rhodes that he had informed Collins that the motorcycle was stolen. *See* Va.-JA 156:22-157:25. By omitting that fact, petitioner's amicus mischaracterizes the record. U.S. Justice Found. Br. 4.

[12] Pet. App. 83-84.

[13] Pet. App. 54.

[14] Pet. App. 72-73; Va.-JA 166:8-23, 189:6-22.

[15] Pet. App. 58, 74.

[16] *See* Pet. App. 56-57.

soon as he saw the Facebook photograph of the motorcycle, he was "100% sure" it was the same one that had eluded him.[17]

Rhodes used his smartphone to photograph the Facebook pictures and then returned to question Collins about them.[18] Collins denied knowing anything about the motorcycle or the house in the photographs; he claimed he had not ridden a motorcycle in a few months.[19] Collins then left the DMV, and Rhodes saw him get into a car with a male driver and female passenger.[20]

Officer Rhodes received a tip that Collins had taken a motorcycle very recently to a shop to have new tires installed. Rhodes asked Officer McCall to investigate that lead.[21]

In the meantime, Rhodes learned from an informant that the house in Collins's Facebook pictures was on Delmeade Avenue. Shortly after Collins left the DMV, Rhodes drove to Delmeade Avenue and quickly located the property in the photographs.[22] Unbeknown

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[17] Va.-JA 100:7-8.

[18] Pet. App. 54-55, 74.

[19] Pet. App. 59; Va.-JA 175:15-176:6.

[20] Va.-JA 18:17-23.

[21] Pet. App. 62.

[22] Pet. App. 58-60; Va.-JA 70:17-21, 71:11-16, 72:1-7.

to Rhodes, the Delmeade property was home to Collins's girlfriend (and the mother of Collins's child); Collins stayed there several nights a week.[23]

When Rhodes arrived at the Delmeade property, he observed a motorcycle, covered in a white tarp, parked in the driveway, "plainly" visible from the roadway.[24] No one was present at the residence.[25] The covered motorcycle had the same silhouette as the stretched-out motorcycle Rhodes was looking for, and he could also see a chrome wheel that was not fully covered by the tarp.[26] While standing on the sidewalk, Rhodes took a photograph of the covered motorcycle. *See* Pet. App. 114.[27] The motorcycle was "a car length or two" into the driveway.[28] It was parked against the retaining wall, near the steps leading up from the driveway to the front door of the house.[29] It was in the same position depicted in the Facebook photograph.[30]

After photographing the vehicle from the sidewalk, Officer Rhodes walked up the driveway and pulled back the tarp to read the motorcycle's license plate and VIN.[31] He confirmed that the motorcycle was

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[23] Pet. App. 89-91.

[24] Pet. App. 60.

[25] Va.-JA 18:13.

[26] Pet. App. 60; Va.-JA 90:8-14.

[27] Pet. App. 60-61; Va.-JA 179:17-19.

[28] Pet. App. 77.

[29] Pet. App. 114.

[30] Va.-JA 120.

[31] Va.-JA 179:19-22.

the same one involved in the July 25 eluding incident.[32] Rhodes then ran the VIN and learned that the motorcycle had been stolen in New York.[33] The license plate had also been changed from the tag he had seen on July 25; the new tag was registered to a Kawasaki motorcycle, not a Suzuki.[34] Rhodes then photographed the uncovered motorcycle, *see* Pet. App. 115, and replaced the tarp.[35]

Rhodes returned to his vehicle to surveil the property, anticipating Collins's imminent arrival.[36] A short time later, a car drove by that Rhodes recognized as the same one that Collins had stepped into when leaving the DMV, but Collins was not in it.[37]

Rhodes walked up the driveway and knocked on the front door of the home; Collins came to the door.[38] Collins had changed clothes from the shorts and flip-flops he had worn at the DMV. Now he was dressed in motorcycle-appropriate attire. Despite that the temperature outside exceeded 90 degrees, Collins had donned jeans, a long-sleeved shirt, and Timberland-type boots, "the same exact boots that the rider was wearing" on July 25.[39]

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[32] Va.-JA 180:16-17. *See also* Pet. App. 67, 87.

[33] Pet. App. 68.

[34] Pet. App. 62.

[35] Pet. App. 89.

[36] Va.-JA 18:15-17.

[37] Va.-JA 18:17-23.

[38] Pet. App. 64.

[39] Pet. App. 65, 67; Va.-JA 182:16-24.

Collins agreed to speak with Rhodes. He initially claimed to know nothing about the motorcycle; then he said it belonged to a friend.[40] As Rhodes questioned Collins, Officer McCall arrived with an invoice from the shop that showed that Collins had purchased new tires for the motorcycle eight days before.[41] Collins then admitted that he had ridden it from his mother's house to the shop to have new tires put on.[42] Upon further questioning, Collins finally admitted to having purchased the motorcycle from Jones.[43]

Officer Rhodes thereupon placed Collins under arrest for receiving stolen property.[44] In a search incident to arrest, Rhodes discovered the motorcycle key in Collins's pocket.[45]

The trial court overruled Collins's motion to suppress the evidence of the tag and VIN obtained when Rhodes looked under the tarp.[46] Collins went to trial, was convicted of receiving stolen property, and was sentenced to three years in prison with all but two months suspended (time already served).[47]

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[40] Pet. App. 64-65.

[41] Pet. App. 63-64; Va. JA 128.

[42] Pet. App. 65.

[43] Pet. App. 68.

[44] Pet. App. 65-66.

[45] Pet. App. 66.

[46] Pet. App. 107.

[47] Va. JA 269-70. *See* Va. Code Ann. § 18.2-108(A) (2014) ("If any person buys or receives from another person, or aids in concealing, any stolen goods or other thing, knowing the same to have

2. Collins appealed the trial court's decision denying his suppression motion, and the Virginia Court of Appeals affirmed.[48] The Court of Appeals found the record insufficient to enable it to determine if the covered motorcycle was within the curtilage of the home.[49] Even assuming it was within the curtilage, the court found that "numerous exigencies justified both [Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number."[50] In particular, a reasonable officer could believe that the motorcycle could be easily moved, particularly in light of the prior eluding episodes.[51] Moreover, Officer Rhodes knew that Collins was aware that he was being investigated and that the police had Collins's own photographs showing the orange and black motorcycle in the driveway.[52] The fact that the motorcycle had been placed under a tarp was also consistent with an intent to conceal it.[53] Accordingly, the court found the search lawful and that it "need not rely on the automobile exception, for exigencies existed aside from the inherent mobility of the motorcycle."[54]

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been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender is not convicted.").

[48] Pet. App. 32-33.

[49] Pet. App. 41.

[50] *Id.*

[51] Pet. App. 42.

[52] *Id.*

[53] *Id.*

[54] Pet. App. 44 n.4.

The Supreme Court of Virginia affirmed, though on a different ground: it concluded that "the facts necessary to resolve this case under the automobile exception to the warrant requirement of the Fourth Amendment were established in the record before the trial court. Therefore, Officer Rhodes' search of the motorcycle was justified. . . ."[55]

Justice Mims dissented. He concluded that Officer Rhodes needed a warrant before looking under the tarp.[56] Like the majority, the dissent did "not address the question of whether the part of the driveway where the motorcycle was parked . . . was curtilage or open field for Fourth Amendment purposes."[57] That did not matter because, in the dissent's view, "[s]earching the tarp without a warrant was unconstitutional even if the area where the motorcycle was parked is considered to be open field."[58]

Collins filed a timely petition for a writ of certiorari.

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[55] Pet. App. 26.

[56] Pet. App. 30-31 (Mims, J., dissenting).

[57] Pet. App. 30 n.4.

[58] *Id.*

REASONS FOR DENYING THE PETITION

I. The Virginia Supreme Court correctly held that the automobile exception applies when the vehicle is located in a driveway, is visible from the street, and is readily mobile.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[59] That protection "generally requires police to secure a warrant before conducting a search."[60]

There are several exceptions to the warrant requirement, however. "One well-recognized exception . . . applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[61] The Virginia Court of Appeals applied that exception to hold that Rhodes's inspection of the VIN and tag number was supported by both probable cause and exigent circumstances.[62]

Another long-standing exception is the "automobile exception," which this Court "recognized nearly [92] years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925)."[63] "'If a car is readily mobile and probable cause exists to believe it contains contraband, the

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[59] U.S. Const. amend. IV.

[60] *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam).

[61] *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

[62] Pet. App. 39-44.

[63] *Dyson*, 527 U.S. at 466.

Fourth Amendment . . . permits police to search the vehicle without more.'"[64] As this Court made clear in *Maryland v. Dyson*, "under our established precedent, the 'automobile exception' has no separate exigency requirement."[65]

As shown below, the Supreme Court of Virginia correctly applied the automobile exception here: Rhodes had probable cause to believe that the motorcycle was stolen and had been twice used to elude police; and despite being under a tarp, the motorcycle was readily mobile, parked in a driveway with easy access to the street.

A. The automobile exception applies because Officer Rhodes had probable cause to believe that the motorcycle was stolen and had been used to elude police.

The Court in *Carroll* "recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests."[66] This Court elaborated on that mobility rationale in *Carney*, explaining that the automobile exception was a categorical rule based on the inherent exigency that the vehicle could be readily moved:

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[64] *Id.* (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)).

[65] *Id.* (discussing *United States v. Ross*, 456 U.S. 798, 809 (1982), and *Labron*, 518 U.S. at 940).

[66] *California v. Carney*, 471 U.S. 386, 390 (1985).

> The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. In *Chambers* [*v. Maroney*, 399 U.S. 42 (1970)], for example, commenting on the rationale for the vehicle exception, we noted that "the opportunity to search is fleeting since a car is readily movable." 399 U.S., at 51. More recently, in *United States v. Ross*, 456 U.S. 798, 806 (1982), we once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit. . . ." The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, [428 U.S. 364, 367 (1976)].[67]

Carney added, however, that while "ready mobility alone was perhaps the original justification for the vehicle exception," later cases established a second justification: " 'less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.' "[68] That reduced expectation of privacy derives "from the pervasive regulation of vehicles capable of traveling on the public highways."[69]

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[67] *Id.* at 390-91 (some citations omitted).

[68] *Id.* at 391 (quoting *Opperman*, 428 U.S. at 367).

[69] *Id.* at 392.

"The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation."[70]

Indeed, in *New York v. Class*, the Court made clear that the VIN on a vehicle is subject to *no* reasonable expectation of privacy whatsoever: "In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment."[71] Accordingly, *Class* held that the locations on a vehicle where the VIN is required to be displayed are categorically not subject to a reasonable expectation of privacy for Fourth Amendment purposes.[72]

The automobile exception plainly applies here. Officer Rhodes had probable cause to believe that the motorcycle in the driveway was stolen and had been used twice to elude police. Rhodes knew that Eric Jones had sold the stolen vehicle to Collins. The motorcycle had unique features, particularly its swept-back rear wheel. When he saw the motorcycle in the picture on Collins's Facebook page, Rhodes was "100% sure" it was the same one in the eluding incident. (It is a felony to disregard a signal by a law-enforcement officer to stop and to elude police in a manner that endangers

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[70] *Id.*

[71] 475 U.S. 106, 112 (1986).

[72] *Id.* at 114.

any person.[73]) When Rhodes found the residence depicted in Collins's Facebook pictures, the motorcycle was covered with a tarp, but it was parked in the same place as in the photo, it had the distinctive silhouette of the vehicle in question, and Rhodes recognized a chrome wheel peeking out at the bottom.[74]

Indeed, petitioner does not contend that probable cause was lacking. Nor does he adopt the argument of the lone dissenting justice below that there is some meaningful difference between a search *of* the motorcycle and the search *for* the motorcycle.[75] The motorcycle itself was clearly the instrumentality of the crime of eluding and the contraband involved in the crime of receiving stolen property.[76]

Moreover, the motorcycle was readily mobile, notwithstanding the tarp. The tarp could be removed and the motorcycle kicked into gear within seconds. The motorcycle had been used to elude police at speeds exceeding 140 mph. Collins had just installed fresh tires.

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[73] Va. Code Ann. § 46.2-817(B) (2014).

[74] *See supra* at 6.

[75] Pet. App. 27 (Mims, J., dissenting).

[76] *See Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) (stating that the automobile exception applies when "the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime"); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 310 (1967) ("The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.").

The vehicle was located in the driveway, with ready access to the street.[77] And in any case, the automobile exception turns on the inherent mobility of a vehicle; it does *not* "depend upon a reviewing court's assessment of the likelihood in each particular case that the [vehicle] would have been driven away . . . during the period required for the police to obtain a warrant."[78]

B. The motorcycle's presence in the driveway does not defeat the automobile exception because the motorcycle had ready access to the street.

The motorcycle's location in the driveway of the residence makes no constitutional difference. For starters, Collins overlooks that this Court in *Scher v. United States* applied the automobile exception to uphold the warrantless search of a vehicle, tailed by police, that the defendant then drove into his garage, "a few feet back of his residence and *within the curtilage*."[79] The Court held that *Carroll* applied in that situation because "it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest."[80] *Scher* thus refutes petitioner's incorrect claim that "this Court has always stopped short of

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[77] *See supra* at 2-6.

[78] *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam).

[79] 305 U.S. 251, 253 (1938) (emphasis added).

[80] *Id.* at 254-55.

applying [the automobile exception] on private, residential property." Pet. 6.

Moreover, the considerations animating the automobile exception—ready mobility and reduced privacy expectations—apply equally to vehicles like Collins's motorcycle, parked in a driveway with immediate access to the street. *Carney*, for instance, held that the automobile exception applies to vehicles even when they are not on public highways—in that case a motor home parked in a public parking lot. The automobile exception applied there because the "motor home was readily mobile" and "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."[81] The Court left open that the outcome might be different for "a motor home that is situated in a way or place that objectively indicates that it is being used as a residence," such as if it were "elevated on blocks" or "connected to utilities," contrasting that with a motor home that had "convenient access to a public road."[82] Collins's motorcycle fits the required elements of the vehicle exception: it was readily mobile, was obviously not being used as a residence, and had "convenient access to a public road."

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[81] 471 U.S. at 388, 393.

[82] *Id.* at 394 n.3.

Collins mistakenly asserts that the following passage from *Carney* supports his claim that the automobile exception does not apply to vehicles in residential driveways:

> When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary *in a place not regularly used for residential purposes*—temporary or otherwise—the two justifications for the vehicle exception come into play.[83]

Collins misreads the italicized language to conclude that the automobile exception does not apply to vehicles in residential driveways; he reasons that a residence where the vehicle is parked is a place "regularly used for residential purposes." Pet. 14. But that reading not only conflicts with *Scher*, which applied the automobile exception to a vehicle within the curtilage of a residence; it conflates the *driveway* (which is not regularly used for residential purposes) with the *house* itself (which is).

As Professor LaFave has correctly explained, *Carney*'s reference to "a place not regularly used for residential purposes" applies comfortably "when the vehicle is parked *on the grounds of the residence* where police have some lawful basis for entering that area,"

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[83] *Id.* at 392-93 (emphasis added).

which is different from "when the vehicle is located *inside* private premises (e.g., a garage)."[84] "Given the fact that police may enter upon such commonly-used areas of the curtilage as a driveway in the course of a legitimate investigation, it would seem that a warrantless seizure of a vehicle from such a place is just as proper as it would be were the car parked on the street."[85]

Indeed, courts routinely hold that driveways are subject to a lessened expectation of privacy, particularly when the driveway, as in this case, is plainly visible from the street.[86] For instance, this Court in *Brigham City v. Stuart* upheld the warrantless entry of the home to avert imminent injury *after* the officers had already "proceeded down the driveway to investigate" complaints about a loud party.[87] And "a police officer not armed with a warrant may approach a home

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[84] Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.2(b) n.59 (5th ed. 2012 & Supp. 2016) (emphasis added).

[85] *Id.* § 7.3(a).

[86] *See* Mei Fung So, *Search and Seizure: Reasonable Expectation of Privacy in Driveways*, 60 A.L.R. 5th 1, § 2a (1998 & Supp. 2016) ("Even if the driveway was part of the curtilage, the courts often go further to consider whether the driveway was impliedly open to the public; thus, it is a place where the public should be anticipated. . . . Courts have held that there is no reasonable expectation of privacy in areas which are normal access routes to the home that anyone, even police officers, have an implied invitation to use as long as they have legitimate business, including police investigation, and act as reasonably respectful citizens.").

[87] 547 U.S. 398, 401 (2006).

and knock, precisely because that is 'no more than any private citizen might do.' "[88]

State courts have similarly observed that "[i]n the course of urban life, we have come to expect various members of the public to enter upon such a driveway. . . . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so."[89] The Supreme Court of Virginia has described this as an "implied consent" that deems "an entry into the curtilage a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment."[90] As Professor LaFave has summarized: "when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, *driveways*, porches), observations

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[88] *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (quoting *King*, 563 U.S. at 469).

[89] *Commonwealth v. A Juvenile (No. 2)*, 580 N.E.2d 1014, 1017 (Mass. 1991) (quoting *State v. Corbett*, 516 P.2d 487, 490 (Or. Ct. App. 1973)). *See also, e.g., State v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (upholding warrantless entry onto driveway, stating that "the record does not reflect that Merrill's driveway was not visible from the public roadway or that Merrill had a gate, fence, or any other sort of obstruction that limited access to the driveway. Any member of the public could have entered upon Merrill's property in the same manner the officers did."); *Keehn v. State*, 279 S.W.3d 330, 335-36 (Tex. Crim. App. 2009) (upholding warrantless search of van parked in defendant's driveway).

[90] *Robinson v. Commonwealth*, 639 S.E.2d 217, 222 (Va. 2007).

made from such vantage points are not covered by the Fourth Amendment."[91]

Collins errs in claiming that Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*[92] prevents the automobile exception from applying to residential driveways. Pet. 12. It is true that in part II-B of the opinion, the plurality declined to apply the automobile exception to justify the warrantless seizure of a Pontiac parked in the defendant's driveway, when the defendant had already been arrested inside the house on suspicion of murder. But the plurality did not single out the driveway; it relied on myriad factors:

> In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.' The objects that the police are assumed to have had probable cause to search for in the

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[91] LaFave, *supra* note 84, § 2.3(f) (emphasis added).

[92] 403 U.S. 443 (1971).

> car were neither stolen nor contraband nor dangerous.[93]

Even taking the plurality opinion at face value, it is easily distinguished on its facts from this case.[94] Unlike the police in *Coolidge*, who had ample time to obtain a warrant to search the Pontiac, Rhodes learned of the motorcycle's location from Collins's Facebook page at the same time that Collins was briefly being detained at the DMV, and Rhodes had good reason to think that Collins would immediately hide the motorcycle as soon as he could get to it. The mobility concern undergirding the automobile exception is particularly acute when, as here, the vehicle's "owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened."[95]

Coolidge is further distinguishable because it involved "a thorough and extensive search of the entire automobile including the *interior* from which, by vacuum sweepings, incriminating evidence was obtained," which is intrusive compared to searches of a vehicle's *exterior*, "for which there [is] no reasonable expectation of privacy."[96] Indeed, there is no reason to think that

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[93] *Id.* at 460.

[94] Various courts have found the *Coolidge* plurality opinion distinguishable based on its "highly fact-specific" approach. *E.g.*, *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

[95] *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality).

[96] *Id.* at 593 n.9 (emphasis added).

the search of the license number and VIN on the Pontiac in Coolidge's driveway would have troubled the *Coolidge* plurality.

In any event, Justice Stewart's plurality opinion in *Coolidge* does not control the outcome here. Four other Justices dissented in *Coolidge* and would have applied the automobile exception.[97] And while Justice Harlan's concurrence provided the fifth vote, he specifically declined to join part II-B of the plurality opinion and said nothing about the significance of the driveway.[98] This Court has aptly recognized that the plurality opinion in *Coolidge* is "not a binding precedent."[99] And to date, "no circuit appears to read *Coolidge* as a per se rule against all driveway searches without a warrant."[100] Indeed, doing so would require overruling *Scher*.

The "alternatives" that Collins would force on police under the facts of this case are the same ones that this Court found unreasonable in *Chambers*.[101] Having probable cause to walk up the driveway and look under the tarp, perhaps Rhodes could have staked out the

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[97] 403 U.S. at 504 (Black, J., dissenting in part, joined by Burger, C.J., and Blackmun, J.); *id.* at 521-22 (White, J., dissenting in part, joined by Burger, C.J.).

[98] *Id.* at 491 (Harlan, J., concurring).

[99] *Texas v. Brown*, 460 U.S. 730, 737 (1983).

[100] *Goncalves*, 642 F.3d at 251. *See also United States v. Brookins*, 345 F.3d 231, 237 n.8 (4th Cir. 2003) ("Although heightened privacy interests may be triggered when a vehicle is encountered on private property, the *Coolidge* plurality opinion cannot be fairly read to create a bright-line rule precluding warrantless searches on private property under all circumstances.").

[101] 399 U.S. at 51-52.

property until a warrant could be obtained, blocking or stopping Collins from moving the motorcycle until the warrant arrived, or perhaps tailing Collins if he showed up and made off with it. But *Chambers* rejected the chase-the-suspect alternative: "Following the [vehicle] until a warrant can be obtained seems an impractical alternative since, among other things, the [vehicle] may be taken out of the jurisdiction."[102] Indeed, experience taught Rhodes that Collins's racing bike was capable of escape speeds exceeding 140 mph.

Chambers also rejected the stake-out-and-immobilize alternative, explaining that the practical burden on the vehicle owner was the same either way:

> Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the [vehicle] itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[103]

Chambers confirmed that, "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a [vehicle] before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."[104] In those circumstances, "there is little to choose in terms of practical consequences between an

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[102] *Id.* at 51 n.9.

[103] *Id.* at 51.

[104] *Id.* at 52.

immediate search without a warrant and the [vehicle]'s immobilization until a warrant is obtained."[105] Accordingly, the automobile exception applies here for the same reasons it applied in *Chambers*.

C. Because petitioner had no reasonable expectation of privacy in the stolen motorcycle or its VIN and tag number, Rhodes properly looked under the tarp.

As shown above, Rhodes had probable cause to believe that the motorcycle was stolen, the motorcycle was plainly visible from the street, and Rhodes had an implied invitation to enter the driveway, given that the motorcycle was parked adjacent to the steps leading up to the front door. The fact that Collins unsuccessfully tried to hide the motorcycle under a tarp makes no constitutional difference.

Rhodes properly looked under the tarp for two independent reasons. First, Collins had no reasonable expectation of privacy in the motorcycle because it was stolen. "Obviously . . . a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'"[106] Concealing the motorcycle under a tarp

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[105] *Id.*

[106] *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

likewise could give Collins no privacy interest in the stolen motorcycle.[107]

Second, *Class* makes clear that there is "no reasonable expectation of privacy in the VIN," so an officer may reach into the vehicle to move things that obstruct the VIN from plain view.[108] There is no constitutionally significant difference between moving papers off the dashboard to read the VIN in *Class*, and lifting the tarp in this case to read the VIN and tag number on the motorcycle's exterior. Put another way, because Rhodes could have constitutionally walked up the driveway to read the VIN if the motorcycle had been uncovered, *Class* entitled him to lift the tarp that obstructed the VIN from view.

None of this means, as Collins frets, that officers with probable cause but no warrant "could creep into garages and carports at night, removing tarps [and] rummaging for contraband in glove boxes." Pet. 8. Viewing the VIN and tag number on the exterior of the vehicle in the daytime, from a vantage point in the driveway where the officer has an implied license to be present, is easily distinguished from entering enclosed

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[107] *See* LaFave, *supra* note 84, § 11.3(f) ("[A] thief has no legitimate expectation of privacy in stolen property, as such, and this means that the thief cannot establish standing solely by virtue of his relationship to the stolen property, but would have to establish that the police actually interfered with his person or with a place as to which he had a reasonable expectation of privacy.") (citation and quotation omitted).

[108] 475 U.S. at 114.

garages in the dead of night to look around. Not surprisingly, courts have had no difficulty addressing such dead-of-night scenarios, noting that officers in those cases "violated the defendant's reasonable expectation of privacy when they entered the driveway late at night, [at] a time when no reasonably respectful citizen would be expected."[109] By contrast, the standard (indeed, commendable) police investigation conducted here during normal daylight hours presents no threat to Fourth Amendment values.

II. There is no significant split of authorities on the question presented.

Collins has not accurately depicted the legal landscape of courts that have addressed the application of the automobile exception to residential driveways. We agree that five federal circuits—the Fourth, Sixth, Seventh, Eighth, and Ninth—have held that the automobile exception applies to vehicles parked in residential driveways.[110] Although Collins claims that the Fifth and Tenth Circuits have gone the other way, a closer inspection reveals that claim to be exaggerated. Only the Fifth Circuit has directly addressed the question,

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[109] 60 A.L.R. 5th 1, § 7 (collecting cases).

[110] *See Brookins*, 345 F.3d at 237-38 (4th Cir.); *United States v. Markham*, 844 F.2d 366, 368 (6th Cir. 1988); *United States v. Hines*, 449 F.3d 808, 814 (7th Cir. 2006); *United States v. Blaylock*, 535 F.3d 922, 926-27 (8th Cir. 2008); *United States v. Reinholz*, 245 F.3d 765, 776 (8th Cir. 2001); *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994).

and if there is a split at all, it is a shallow one, the resolution of which would have no bearing on the outcome of this case.

In *United States v. Reed*, the Fifth Circuit upheld the warrantless search of the trunk of a car, parked in the defendants' driveway, based on the district court's finding of exigent circumstances.[111] The drivers were suspects in a bank robbery and the police traced the car to the driveway based on a tracking device the teller hid in the cash she handed over. The opinion nowhere says that the automobile exception does *not* apply to residential driveways. Collins just intuits that, Pet. 19, because the *Reed* court engaged in an extensive analysis of the facts showing that exigent circumstances were present. But Collins's inference hardly qualifies as a holding. And it is important to recall that when *Reed* was decided in 1994, various courts were mistakenly holding that a separate finding of exigency was required for the automobile exception to apply, an error that this Court corrected in *Labron* (1996) and again in *Dyson* (1999), holding that the automobile exception has no such exigency requirement.[112]

Collins next cites the Fifth Circuit's 2006 decision in *United States v. Fields*, but the court there upheld the warrantless search of a vehicle that the driver crashed into his own duplex while trying to elude police.[113] It is true that *Fields* has dictum supportive of

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[111] 26 F.3d 523, 530 (5th Cir. 1994).

[112] *See Labron*, 518 U.S. at 940; *Dyson*, 527 U.S. at 466-67.

[113] 456 F.3d 519, 524-25 (5th Cir. 2006).

Collins's argument. The court read two earlier opinions—neither involving residential driveways—for the proposition that the "automobile exception *may* not apply when a vehicle is parked at the residence of the criminal defendant."[114] But the court noted that *that* issue was not presented because the defendant did not use his duplex for residential purposes and because his vehicle was not in the driveway, but crashed into the duplex itself.[115] In light of those distinctions, *Fields* cannot fairly be counted as holding that the automobile exception is inapplicable to residential driveways.

The best citation supporting Collins's putative circuit split is the Fifth Circuit's decision last year in *United States v. Beene*,[116] but *Beene* is internally inconsistent, and it is not apparent that applying *Beene*'s holding would have any effect on the outcome of this case. Police received a call that Beene, a known drug dealer, had brandished a gun and then driven away in a Honda Accord. An officer intercepted Beene's car just as Beene drove into his residential driveway, where he parked five feet from the street and exited the vehicle. Beene threatened the officer and was detained on the ground. In the meantime, another officer arrived with a drug-sniffing dog, which alerted on the Honda. The

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[114] *Id.* (emphasis added). The court cited dicta in *United States v. Sinisterra*, which involved a mall parking lot, 77 F.3d 101, 104-05 (5th Cir. 1996), and *United States v. Williams*, which involved an apartment-complex parking lot, 124 F. App'x 885, 887 (5th Cir. 2005).

[115] 456 F.3d at 525.

[116] 818 F.3d 157 (5th Cir.), *cert. denied*, 137 S. Ct. 113 (2016).

officer opened the car door, finding illegal drugs and a loaded handgun.[117] The Fifth Circuit held that the use of the dog to detect drugs inside the car did not violate the Fourth Amendment because the portion of the driveway where Beene parked "was not part of the curtilage of Beene's home."[118] The court, however, then observed that exigent circumstances would be required to search inside the car because the car was in the driveway; the court remanded for the district court to determine if exigent circumstances were present.[119]

Those two rulings are difficult to square. If the car was outside the curtilage, justifying the use of a drug-sniffing dog to detect drugs inside the car, then it is hard to understand why the automobile exception would not also apply to allow a search inside the car. What is more, in light of the court's ruling about the use of the drug-sniffing dog, it is likely that the court would have approved the search of the *exterior* of the vehicle, or at least inspection of the VIN—the conduct at issue in this case, independently authorized by *Class*—notwithstanding that the car was in the driveway. We also note that the facts of *Beene* fall squarely within the holding of *Scher*, which upheld the automobile exception as applied to a vehicle that police followed as it pulled into a garage, despite that it was inside the curtilage.

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[117] *Id.* at 159-60.

[118] *Id.* at 162.

[119] *Id.* at 164-65.

So while it is true that *Beene* diverges somewhat from the rule in other circuits, it does not evidence a split on the question presented in this case. As it stands now, *Beene* is an outlier with regard to applying the automobile exception to justify searching the *interior* of a car parked in a residential driveway. And it says nothing about inspecting the *exterior* of a vehicle or examining the vehicle's VIN and tag number, the only conduct that is relevant in this case.

The other cases cited by Collins likewise fail to show that the relevant authorities are divided. The Tenth Circuit in *United States v. DeJear* upheld a warrantless search of a vehicle parked in the driveway of a residence that did not belong to the defendant.[120] The court quoted the Fifth Circuit's dictum in *Fields* that "'the automobile exception . . . *may* not apply when [the vehicle] is parked at the residence of the criminal defendant challenging the constitutionality of the search.'"[121] But the Court found that possibility irrelevant because DeJear's car was not parked outside "*his*" residence.[122] Although the court came close to the issue presented here, it plainly did not reach it. Accordingly, *DeJear* does not count as holding that the automobile exception cannot apply to a defendant's vehicle parked in his own driveway.

Nor do the Georgia and Illinois cases cited by Collins show a relevant split. Pet. 7-8, 20-21. *Vickers*

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[120] 552 F.3d 1196, 1202 (10th Cir. 2009).

[121] *Id.* (quoting *Fields*, 456 F.3d at 524-25) (emphasis added).

[122] *Id.*

and *Redwood* are *intermediate* appellate decisions and therefore do not count under Rule 10 as decisions of "a state court of last resort."[123] Both cases also involved a finding that the vehicle search occurred within the curtilage of the defendant's residence,[124] something that no court below has found in this case (a point on which we expand below). And although *Lejeune* involved a decision by Georgia's highest court, that case is easily distinguishable because the officers there lacked probable cause to search the vehicle, the crucial prerequisite to applying the automobile exception.[125]

In short, because there is neither a pronounced nor mature circuit split on the issue presented here, "this is exactly the sort of issue that could benefit from further attention" in lower courts.[126] This Court "should not rush to answer a novel question . . . in the absence of a pronounced conflict,"[127] a conflict that does not yet exist. As Justice Ginsburg has noted, this Court "in many instances [has] recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more

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[123] *See State v. Vickers*, 793 S.E.2d 167, 171 (Ga. Ct. App. 2016); *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002).

[124] *Vickers*, 793 S.E.2d at 272; *Redwood*, 772 N.E.2d at 812-13.

[125] *State v. Lejeune*, 576 S.E.2d 888, 893 (Ga. 2003).

[126] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

[127] *Id.*

enduring final pronouncement by this Court."[128] This is a clear case where prudence dictates waiting until a genuine conflict arises.

III. This case is a poor vehicle to reach the question presented.

This case also comes with two vehicle problems that make it an unattractive candidate for certiorari.

A. No court below made any finding that the motorcycle was parked within the curtilage.

As just pointed out, *Vickers* and *Redwood* were predicated on the vehicle's being in the curtilage of the defendant's home.[129] Although those intermediate State-court decisions are not relevant in demonstrating a relevant split of authorities, their assumption that the vehicle was in the curtilage underscores that some courts have found curtilage determinations to be important when assessing the automobile exception.[130] The Fifth Circuit's decision in *Beene*, Collins's lead case, is one example of a court finding that the portion of the driveway where the vehicle was parked "was *not* part of the curtilage."[131] And this Court has made clear

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[128] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[129] *See supra* at 32.

[130] *See* 60 A.L.R. 5th 1, § 4(a) (collecting cases).

[131] 818 F.3d at 162 (emphasis added). *See also United States v. Moody*, 668 F. App'x 629, 629 (5th Cir. 2016) ("Our review of the

that the "Government's . . . intrusion" onto real property that is outside the curtilage of a home "is of no Fourth Amendment significance."[132]

Petitioner is wrong that the Commonwealth conceded below that the motorcycle was within the curtilage. Pet. 11. There was no such concession, and petitioner identifies none in the record. What is more, there is good reason to conclude that Collins's motorcycle was outside the curtilage. *United States v. Dunn* teaches that "curtilage questions should be resolved with particular reference to four factors: [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by."[133] The first factor admittedly tilts towards a curtilage finding, as the motorcycle's location in the driveway was adjacent to the steps leading up to the house, and therefore close to the house itself. But the three other factors weigh against a curtilage finding: the driveway was not within an enclosure that also surrounded the home; the driveway was used only to park vehicles; and no fence or gate was used to shield activities in the driveway from travelers passing

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record and pertinent jurisprudence supports the district court's conclusion that Moody's driveway was not part of the curtilage of his home.").

[132] *United States v. Jones*, 565 U.S. 400, 411 (2012).

[133] 480 U.S. 294, 301 (1987).

by.[134] Under those circumstances, the portion of the driveway where the motorcycle was parked was not curtilage because it did not "harbor[] the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'"[135] Indeed, Collins himself had posted pictures of the driveway and the motorcycle on his Facebook page, discrediting any notion that he tried to keep his activities there entirely private.

Petitioner assumes at times that the trial judge found that the motorcycle was within the curtilage, Pet. 6, but there was no such finding, Pet. App. 105-07 (bench ruling). The Virginia Court of Appeals expressly declined to reach that question, "assum[ing] without decid[ing]" that Rhodes had "entered the curtilage."[136] And although the curtilage issue did not factor into the Virginia Supreme Court's decision, the dissenting justice expressly declined to address whether the part of the driveway where the motorcycle was parked was in the curtilage.[137]

As shown above, this Court's decision in *Scher* demonstrates that the automobile exception can apply to vehicles within the curtilage. But assuming for argument's sake that the Court were interested in using

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[134] *See* Pet. App. 112-13 (photographs).

[135] *Dunn*, 480 U.S. at 300 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

[136] Pet. App. 41.

[137] Pet. App. 30 n.4 (Mims, J., dissenting).

the vehicle's presence in the curtilage to refine or narrow the automobile exception, the Court would have to resolve disputed factual questions to adjudicate the controversy. This "'is a court of final review and not first view.'"[138] Prudence dictates preferring a case in which curtilage findings have already been made by the lower courts.

B. Even if he could escape the automobile exception, Collins would not prevail on his suppression motion.

This case is also a poor vehicle because, even setting aside the automobile exception, Collins would not prevail on his suppression motion. The search of the VIN and tag number on the exterior of Collins's motorcycle was authorized by *Class*. And the search was supported independently by exigent circumstances. As the Virginia Court of Appeals correctly found, "numerous exigencies justified both [Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number."[139]

In particular, Rhodes could reasonably believe that Collins was already en route from the DMV to hide the motorcycle, since Rhodes had just questioned Collins about the photos on his Facebook page that showed the motorcycle parked in the driveway of the

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[138] *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1338 (2015) (Thomas, J., concurring) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

[139] Pet. App. 41.

Delmeade property. The fact that the motorcycle had twice eluded police, at speeds upwards of 140 mph, showed that it was capable of eluding them again. It was also parked in the driveway, with ready access to public roads. And Collins might arrive at any minute to hide it. Indeed, that appears to be exactly what Collins planned when he arrived at the Delmeade property and changed into his motorcycle outfit, the motorcycle key in his pocket.

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Accepting Collins's legal theory would require this Court to at least partially overrule *New York v. Class* and *Scher v. United States*, two cases that neither Collins nor his amicus even mentions. Moreover, there is at best only a shallow split of authorities on whether the automobile exception authorizes the search of the *interior* of readily mobile vehicles parked in residential driveways; there is no split at all on looking at the VIN and tag numbers on the *exterior* of such vehicles. And given the absence of any curtilage findings by the courts below, and the fact that the search in any event was plainly justified by exigent circumstances, this case would be a poor choice for examining the scope of the automobile exception in the context of residential driveways.

CONCLUSION

The petition for a writ of certiorari should be denied.

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June 7, 2017